

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
LEVEL 3 COMMUNICATIONS LLC)	
)	
Petition for Forbearance Under)	
47 U.S.C. §160(c) from Enforcement)	WC Docket No. 03-266
of 47 U.S.C. §251(g), Rule 51.701(b)(1))	
and Rule 69.5(b))	

REPLY COMMENTS OF THE
ALABAMA MISSISSIPPI TELECOMMUNICATIONS ASSOCIATION,
CALIFORNIA TELEPHONE ASSOCIATION SMALL COMPANY COMMITTEE,
INDEPENDENT TELEPHONE COMPANIES OF VERMONT,
INDIANA EXCHANGE CARRIER ASSOCIATION,
MICHIGAN EXCHANGE CARRIERS ASSOCIATION,
MISSOURI SMALL TELEPHONE COMPANY GROUP,
MONTANA TELECOMMUNICATIONS ASSOCIATION,
NEW HAMPSHIRE TELEPHONE ASSOCIATION,
OKLAHOMA RURAL TELEPHONE COALITION,
OREGON TELECOMMUNICATIONS ASSOCIATION,
TELEPHONE ASSOCIATION OF MAINE,
TEXAS STATEWIDE TELEPHONE COOPERATIVE, INC.,
WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION
AND
THE WISCONSIN STATE TELEPHONE ASSOCIATION

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INTRODUCTION

These Reply Comments are filed on behalf of a group of formal and ad hoc state associations of rural telephone companies. The entities and coalitions joining in these Reply Comments are as follows: the Alabama Mississippi Telecommunications Association, the California Telephone Association, the Independent Telephone Companies of Vermont, the Indiana Exchange Carrier Association, the Michigan Exchange Carriers Association, the Missouri Small Telephone Company Group, the Montana Telecommunications Association, the New Hampshire Telephone Association, the Oklahoma Rural Telephone Coalition, the Oregon Telecommunications Association, the Telephone Association of Maine, Texas Statewide Telephone Cooperative, Inc., the Washington Independent Telephone Association and the Wisconsin State Telephone Association.¹ In these Comments, these entities will be referred to collectively as the “Rural Companies.”

SUMMARY

These Reply Comments address four issues raised in the opening round of comments. The first is whether the Petition filed by Level 3 constitutes the proper procedural docket to consider the issues raised by Level 3. The second is whether the types of services described by Level 3 are subject to interstate and intrastate access charges. The third is the probable effect that granting Level 3’s Petition may have on universal service support. The fourth issue is what effects the granting of Level 3’s Petition may have on consumers in rural areas and on the rural telephone companies that serve them.

These Reply Comments conclude that this docket is not the proper procedural vehicle to

¹ The individual companies for each of the state groups are listed in the Opening Comments filed on March 1, 2004.

address the issues raised by Level 3. The Reply Comments further conclude that Level 3's Petition should be dismissed on a substantive basis because the services offered by Level 3 are and should be subject to interstate and intrastate access charges.

These Reply Comments conclude that granting Level 3's Petition would have serious deleterious effects on universal service contributions. Finally, these Reply Comments point out that granting Level 3's Petition would ultimately have serious effects on customers in rural service areas and, at the very least, hinder the rural telephone companies' abilities to provide state of the art service to those rural customers.

REPLY COMMENTS

1. This Docket is not the Correct Procedural Choice for Consideration of the Issues Raised by Level 3.

Many of the Voice over Internet Protocol (VoIP) providers submitting comments in this docket argue that granting Level 3's Petition will establish regulatory certainty.² These parties often argue that forbearance is required.³

However, the better view is expressed by commenters such as BellSouth that correctly point out that the Petition filed by Level 3 "seeks to change the rules around access compensation, an inappropriate objective for a forbearance petition."⁴ BellSouth goes on to point out that the proper vehicle would be either a petition for declaratory ruling or a general

² See, e.g., Comments of Broadwing Communications, LLC at p. 5.

³ Broadwing at p. 7-8. See, also, Comments of the CompTel/ASCENT Alliance at p. 5.

⁴ Comments of BellSouth at p. 1.

ratemaking.⁵ Many other commenters support such an outcome, pointing to the VoIP rulemaking as perhaps a better docket.⁶

The forbearance test set forth in 47 U.S.C. §160 is a three-prong test. Several of the commenters correctly point out that Level 3 fails to meet the three-prong test set forth in statute. The three prongs of the forbearance test are: (1) enforcement is not necessary to ensure that the charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest. It has recently been affirmed that this test is a conjunctive test, all three elements must be met. See, Cellular Telecomm. & Internet Ass'n et al. v. Federal Communications Comm'n et al., 330 F.3d 502 at 509 (D.C. Cir. 2003).

The Comments of America's Rural Consortium (ARC) discuss in detail why Level 3 fails to meet the forbearance standard. Clearly and concisely, ARC points out that "[t]he access services LECs provide to IP telephony service providers are the same access services that LECs provide to POTS service providers. Level 3 has failed to show how it is not discriminatory to charge POTS telephony service providers for access services, and not charge IP telephony service providers for the same access services."⁷ Thus, Level 3's Petition fails the first prong of the test.

As BellSouth states, Level 3's arguments that IP technology will wither and die on the vine because of the existence of switched access charges are not true. BellSouth demonstrates that Level 3 has presented no facts indicating that packet switched technology deployment has suffered.⁸ The public interest test (prong three) is not satisfied.

⁵ Comments of BellSouth at p. 1 and 4.

⁶ See, e.g., Comments of Sprint Corporation at p. 2.

⁷ America's Rural Consortium Comments in Opposition to the Level 3 Petition at p. 7.

⁸ Comments of BellSouth at p. 14.

The California Public Utilities Commission Comments probably contain the most succinct statement on this issue:

In short, until the FCC concludes its proceeding on VoIP service, it is premature to grant Level 3's Petition for forbearance. Indeed, it would be legal error for the FCC to make the findings under 47 U.S.C. §160 with respect to only one issue governing the impact of VoIP service on the telecommunications market without comprehensively considering closely related issues, including the impact of VoIP on universal service policies.⁹

The Rural Companies join with those that advance the position that the Level 3 Petition is the wrong proceeding to consider the issues raised by Level 3. Further, Level 3 has failed to demonstrate how its Petition meets the standards for granting forbearance.

2. Level 3's Services are Subject to Access Charges.

Some of the parties argue that the current state of the law is that services like Level 3's VoIP service are not currently subject to access charges.¹⁰ Such arguments are misplaced. As argued by BellSouth: "...any 'dispute' about 'whether access charges apply' is a contrivance of Level 3. These charges must apply by law, or there would be nothing for the Commission to forbear from. Level 3, of course, seeks forbearance from the application of these charges, without conceding their applicability."¹¹

Level 3 clearly uses the public switched telephone network (PSTN) for the origination and termination of long distance calls. It is the application of access charges to this type of traffic that is the *status quo ante*, not the lack of application. As stated by the Verizon Telephone Companies, Level 3 is providing a service that allows its customers to engage in a real-time

⁹ Comments of the People of the State of California and the California Public Utilities Commission at p. 4-5. See, also, Comments of the Iowa Utilities Board.

¹⁰ See, e.g., Comments of USA Datanet Corporation at p. 3 and AT&T's ex parte filing made under cover of letter dated March 5, 2004.

¹¹ Comments of BellSouth at p. 5. See, also, Comments of Verizon Telephone Companies at p. 6, et seq.

voice conversation during a phone-to-phone call with customers of other local exchange carriers located on the PSTN. Verizon points out that there may be other services offered by Level 3 which may fall into the information service category. However, the voice calling service offered by Level 3 does not.¹² Verizon goes on to distinguish Level 3's service from the FWD service offered by pulver.com. While Level 3's service uses the PSTN, the FWD call does not. Level 3 admits that it provides its customers with transmission to complete the voice calls; pulver.com does not.¹³ Level 3's service is subject to existing access charge tariffs.

MCI has taken the opportunity in this docket, as it does in most dockets, to attack the existing access compensation system.¹⁴ MCI argues that the existing system creates the opportunity for regulatory arbitrage. However, MCI's arguments are irrelevant and wrong. MCI's arguments are irrelevant because they are not related to the Level 3 Petition for forbearance. MCI's arguments are wrong because it is not the access charge system that creates the opportunity for regulatory arbitrage, it is the actions of carriers like MCI, Level 3 and others that attempt to avoid the payment of access charges or, as ARC points out, unilaterally determine that they will not pay access charges.¹⁵

The Rural Companies ask that the Commission confirm that access charges apply when a voice-to-voice long distance service uses the PSTN.

¹² See, Comments of the Verizon Telephone Companies beginning at p. 7.

¹³ Ibid. See, also, National Telecommunications Cooperative Association Initial Comments at p. 8, which also contrasts Level 3's service against pulver.com's FWD.

¹⁴ Comments of MCI at p. 6, et seq.

¹⁵ American Rural Consortium's Comments in Opposition to the Level 3 Petition at p. 5; Comments of Verizon Telephone Companies at p. 18.

3. Granting Level 3's Petition Raises Concerns about the Viability of Universal Service Funding.

The California Public Utilities Commission correctly identifies that even Level 3 recognizes that granting its request may cause such substantial increases in local rates such that services may become unaffordable. The California Commission notes that "...Level 3 seeks to shift the cost avoided by Level 3 by not paying access charges to captive end use customers, which in turn could lead to substantial rate increases..."¹⁶ This raises significant universal service issues.¹⁷

The California Commission goes on to point out that the answer to these universal service issues does not lie in granting Level 3's Petition "...when the grant of Level 3's Petition may significantly and in the near term undermine the availability and affordability of voice telephone service in high cost and rural areas and to the deaf and disabled."¹⁸ The Rural Companies agree with the California PUC.

Sprint Corporation also voices concern about the impact of granting Level 3's Petition may have on universal service funding: "...it is not at all clear that such [VoIP] providers do now or will in the future include the revenues associated with these [VoIP] services in the revenue base used to calculate universal service contribution factors."¹⁹

The Rural Companies join those commenters that urge the Commission not to grant Level 3's Petition because of its unknown, but potentially disastrous effect on universal service funding.

¹⁶ Ibid.

¹⁷ Comments of the People of the State of California and the California Public Utility Commission at p. 4.

¹⁸ Ibid.

¹⁹ Comments of Sprint Corporation at p. 4-5.

4. Granting Level 3's Petition will have Negative Effects on Customers in Rural and High Cost Areas and the Companies that Serve those Customers.

Level 3 asserts in its Petition that the forbearance should not apply to areas served by rural telephone companies. Clearly, however, granting the Petition would proverbially be letting the camel's nose into the tent: Once the nose enters, the rest of the body will follow. There are many potentially significant outcomes to customers in rural and high cost areas and the companies that serve them from granting Level 3's Petition.

As the California Commission points out, Level 3 itself recognizes that there will be substantial increases in local rates from granting its Petition.²⁰ As explained by the National Telecommunications Cooperative Association, this increase to local rates would come about because local exchange companies (LECs) would be forced to raise those rates to cover the costs imposed on the networks by VoIP providers. Rate shock and potential loss of subscribers to the PSTN would be a real possibility, particularly for lower income consumers who cannot afford a high speed Internet access connection.²¹

The Joint Comments of the National Associations relate the very real proposition that there is nothing about VoIP services which will result in lower access costs to a LEC. The Rural Companies, indeed all LECs, will continue to have the cost of supporting their networks to originate and terminate an ever increasing volume of calls that use VoIP services.²² Verizon points out that access charges are necessary for LECs to cover the costs of supporting their

²⁰ Comments of the People of the State of California and the California Public Utilities Commission at p. 4.

²¹ National Telecommunications Cooperative Association Initial Comments at p. 3-4.

²² Joint Comments of the Independent Telephone & Telecommunications Alliance, National Exchange Carrier Association, Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies, and United States Telecom Association at p. 2-3.

networks. To the extent that Level 3 argues that these costs should be recovered from local customers, this amounts to an improper subsidy of Level 3's services.²³

The Rural Companies agree that Level 3's Petition should be denied given the potential far-reaching impact it could have on customers in rural and high cost areas and the local exchange companies that serve them.

CONCLUSION

Based upon the foregoing, the Rural Companies respectfully request that the Commission deny Level 3's Petition.

Respectfully submitted this 31st day of March, 2004.

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²³ Comments of the Verizon Telephone Companies at p. 15.